BORA LASKIN LAW LIBRARY
3 1761 03323 3693

FIRST NATIONS AND THE LAW

PART II

JOHN BORROWS

FACULTY OF LAW

UNIVERSITY OF TORONTO

SPRING TERM 1992

BORA LASKIN LAW LIBRARY

JAN 7 1992

FACULTY OF LAW
UNIVERSITY OF TORONTO

BORA LASKIN LAW LIBRARY
UNIVERSITY OF TORONTO

FIRST NATIONS AND THE LAW

PART II

JOHN BORROWS

FACULTY OF LAW

UNIVERSITY OF TORONTO

SPRING TERM 1992

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/firstnationslaw02borr

TABLE OF CONTENTS

CHAPTER I: INTRODUCTORY READINGS

1. Alan D. McMillan, Native Peoples and Cultures of Canada (Vancouver: Douglas and McIntyre, 1988) at 1. 1

2. Some Facts and Figures 18

3. "Aboriginal Concepts of Justice" A.C. Hamilton and C.M. Sinclair, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1 (Winnipeg: Queens Printer, 1991) at 17-45. 24

4. Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver: Douglas and McIntyre, 1981) at 34 - 48. 53

CHAPTER II: ABORIGINAL LAND RIGHTS

1. The Royal Proclamation of October 7, 1763, R.S.C, 1985, App. II, No. 1. 63

2. Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in Boldt and Long eds. The Quest for Justice: Aboriginal People and Aboriginal Rights (Toronto: U. of T. Press, 1985) at 114. 64

3. Worcester v. The State of Georgia (1832), 6 Peters 515, 31 U.S. Rep. 350 (U.S. S.C.). 67

4. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (U.S. S.C.) 85

5. St. Catherines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.) 93

6. Calder v. A.G. of British Columbia (1973) 34 D.L.R. (3d) 145 (S.C.C.) 100

7. Guerin v. The Queen (1984) 13 D.L.R. (4th) 321 (S.C.C.) 143

8. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 412 163

CHAPTER III: TREATIES

1. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 425. 165

2. R. v. Syliboy [1929] 1 D.L.R. 307 (N.S. Co. Ct.) 168

3. R. v. Sikyea (1964) 43 D.L.R. (2d) 150 (N.W.T. C.A.) 174

4. Sikyea v. The Queen [1964] S.C.R. 642 (S.C.C.) 183

5. Pawis v. The Queen (1979) 102 D.L.R. (3d) 602 (F.C. T.D.) 184

6. Simon v. The Queen (1985) 24 D.L.R. (4th) 390 (S.C.C.) 193

7. Ontario (Attorney General) v. Bear Island Foundation (1989) 58 D.L.R. (4th) 117 (Ont. C.A.) 207

8. Ontario (Attorney General) v. Bear Island Foundation (1991) 83 D.L.R. (4th) 381 (S.C.C.) 221

9. R. v. Sioui (1990) 70 D.L.R. (4th) 427 (S.C.C.) 223

10. R. v. Ireland and Jamieson (1991) 1 O.R. (3d) 577 (Ont. Gen. Div.) 246

11. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 442. 256

CHAPTER IV: FIRST NATIONS AND FEDERALISM

1. The Constitution Act 1867, s. 91 (24) 259

2. Douglas Sanders, "The Constitution, the Provinces, and Aboriginal Peoples" in J. Anthony Long and Menno Boldt, Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988), at 151-63, 287-8.

3. Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill Law Journal 308 at 362-80. 271

4. Dick v. The Queen (1985) 23 D.L.R. (4th) 33 (S.C.C.) 283

5. R. v. Horseman [1990] 4 W.W.R. 97 (S.C.C.) 293

CHAPTER V: FIRST NATIONS WOMEN: TRADITIONAL and CONTEMPORARY EQUALITY AND INEQUALITY

1. Paula Gunn Allen, The Sacred Hoop (Boston: Beacon Press, 1986) at 262. 316

2. Carolyn Niethammer, Daughters of the Earth: The Lives and Legends of American Indian Women (New York: Collier Books, 1977) at 139-152. 321

3. Basil Johnston, "Mother Earth" in Ojibway Heritage (Toronto: McClelland and Stewart, 1976) at 23-25. 329

4. Robert A. Williams Jr., "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 24 Georgia Law Review 1019 at 1036-1043. 332

5. "Aboriginal Women" in A.C. Hamilton and C.M. Sinclair, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1 (Winnipeg: Queens Printer, 1991) at 475-487. 336

6. Derrickson v. Derrickson (1986) 26 D.L.R. (4th) 175 (S.C.C.) 347

7. Richard H. Bartlett, "Indian Self-Government, the Equality of the Sexes, and the Application of Provincial Matrimonial Property Laws" (1986) 5 Canadian Journal of Family Law at 188 - 195. 357

CHAPTER VI: FIRST NATIONS WOMEN AND THE INDIAN ACT

1. The Indian Act R.S.C. 1970, c. I-6. 363

2. Lavell v. Attorney General of Canada (1973) 38 D.L.R. (3d) 481 365

3. Lovelace v. Canada 36 U.N. GOAR Supp. (No.40) Annex XVIII. Doc. A/36/40 (1981) 385

4. "Retrospective", Enough is Enough: Aboriginal Women Speak Out (Toronto: The Women's Press, 1987) at 215 - 245. 393

5. The Indian Act R.S.C. 1985, c. I-5. 407

6. Verna Kirkness, "Emerging Native Women" (1987-1988) 2 Canadian Journal of Women and the Law 408 409

7. Report to Parliament "Implementation of the 1985 Changes to the Indian Act" (Ottawa: Supply and Services) at 8 - 11. 416

8. Nitya Duclos "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo Law Review 325 at 375-380. 420

CHAPTER VII: FIRST NATIONS CHILD WELFARE

1. "Child Welfare" in A.C. Hamilton and C.M. Sinclair, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1 (Winnipeg: Queens Printer, 1991) at 509-520. 423

2. Racine v. Woods (1983) 1 D.L.R. (4th) 193 (S.C.C.) 436

3. Re C.J.W.S. [1987] 1 C.N.L.R. (Alta. Q.B.) 444

4. Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 Canadian Journal of Women and the Law 1. 447

5. Emily F. Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986) 5 Canadian Journal of Family Law 111-138. 463

CHAPTER VIII: FIRST NATIONS AND CRIMINAL JUSTICE

1. Geoffrey York, The Dispossessed: Life and Death in Native Canada (Toronto: Lester and Orpen Dennys Ltd., 1989) at 141 - 174. 472

2. Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations 1989 (Halifax: Province of Nova Scotia, 1989) 482

3. Fran Sugar and Lana Fox, "Nistum Peyako Seht'wawin Iswewak: Breaking Chains (1989-1990) 3 Canadian Journal of Women and the Law 465. 483

4. Carol LaPrairie, "Native Women and Crime in Canada: A Theoretical Model", in Ellen Adelberg and Claudia Currie, eds. Too Few to Count: Canadian Women in Conflict with the Law (Vancouver: Gang Press Publishers, 1987) at 103-112. 496

5. "The Argument for Aboriginal Justice Systems" in A.C. Hamilton and C.M. Sinclair, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1 (Winnipeg: Queens Printer, 1991) at 256-264. 503

6. Michael Coyle, Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall Law Journal 605 513

CHAPTER IX: THE CONSTITUTION ACT 1982

1. The Constitution Act 1982, ss. 25, 35, 35.1 535

2. R. v. Sparrow (1990) 70 D.L.R. (4th) 385 (S.C.C.) 536

3. Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow (1991) XXIX Alberta Law Review 498. 557

4. "Joint Aboriginal Proposal for Self-Government" First Ministers Conference on Aboriginal Constitutional Matters, March 26-7, 1987. 577

5. Phil Fontaine, "Speaking Notes" Bridging the Constitutional Gap (Winnipeg: Canadian Bar Association, 1991). 584

CHAPTER X: FIRST NATIONS SOVEREIGNTY

1. Logan v. Styres (1959) 20 D.L.R. (2d) 416 (Ont. H.C.) 595

2. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 388. 601

3. J. Anthony Long, "Political Revitalization in Canadian Native Indian Societies" (1990) XXIII:4 Canadian Journal of Political Science 767. 609

4. Chief Roy Fox "Jurisdictional Conflicts and the Blood Indian Band" in J. Anthony Long and Menno Boldt eds., Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988) at 188-193. 631

5. Menno Boldt and J. Anthony Long in J. Anthony Long and Menno Boldt, eds., Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988) at 38-56. 634